BUMIPUTRA LLOYDS LEASING BHD.

v.

SYKT. TEKNOMEWA SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C2266 OF 1985]
24 APRIL 1990

CONTRACT: *Guarantee - Whether guarantor liable when principal debtor defaults - Defence of non est factum - Fraudulent misrepresentation - Not pleaded in defence but stated in affidavit.*

This is an appeal by the plaintiff requesting that the plaintiff be allowed to sign final judgment against the 2nd defendant.

The plaintiff entered into a master agreement and leasing agreement with the 1st defendant. Under the leasing agreement the plaintiff agreed to let and the 1st defendant agreed to take on lease the goods described in Appendix 1 of the leasing agreement. The leasing agreement *inter alia* also specified that the goods described in Appendix 1 be kept in a specified place.

The master agreement provided *inter alia* that the goods shall be permanently kept or garaged at the premises specified in the leasing contract or such other premises as previously authorised in writing by the owner. Where no such premise are specified than the lessee may keep or garage the goods at any premises at his discretion and if called upon to do so he shall inform the owner in writing of the premises.

The agreement also contained provisions as to the use, storage or installation of any goods other than mobile goods in premises not owned by the lessee at that time.

The master agreement also *inter alia* provided that upon the termination of the leasing agreement, the lessee would pay the owner all rental due or in arrears at the date of such termination together with interest.

The 2nd defendant was one of the 3 guarantors who executed 3 separate letters of guarantee. Under this guarantee the 2nd defendant had agreed to pay on demand any sum due and payable by the 1st defendant to the plaintiff under the leasing agreement.

The plaintiff was informed that the 1st defendant had, without the consent, agreement or knowledge of the registered proprietor installed and affixed the goods in the said premises. The plaintiff also alleges that the 1st defendant had failed to procure from the owner a waiver of any rights of the owner and thereby had committed a breach of the master agreement which caused termination of both the master agreement and leasing agreement according to Clause 11(a) of the master agreement.

Held:

[1] The party that relies on the defence of *non est factum* must show that it exercised such reasonable care as was appropriate in the circumstances in entering into the transaction.

[2] The burden of establishing the plea of *non est factum* falls on the party seeking to disown the document.

[Appeal allowed with costs.]

Cases referred to:

Avon Finance Co. Ltd. v. Bridger & Anor. [1985] 2 All ER 281
First National City Bank of Chicago v. Tan Lai Wah [1981] 1 MLJ 100
Banque De Paris Et Des Pays-Bas v. Costa De Naray [1984] 1 Lloyd's Rep 21

For the plaintiff - L.T. Chia; M/s. Skrine & Co
For the respondent - Chandran G. Nair; M/s. Thevin, Chandran, Siva, Wong & Jamal

JUDGMENT

Zakaria Yatim J:

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar given on 21 May 1987 refusing to grant the plaintiff's application to sign final judgment against the second defendant for a sum of RM848,841.11 together with interest and costs.

The facts are that on 20 November 1984 the plaintiff entered into a master agreement and a leasing agreement with the first defendant, Syarikat Teknomewa Sdn. Berhad. Under the leasing agreement the plaintiff agreed to let and the first defendant agreed to take on lease the goods described in Appendix 1 of the leasing agreement. The leasing agreement provided that the primary rent payable by the lessee was RM17,086.75 per month for a period of forty-eight months. The leasing agreement also provided that the goods described in Appendix 1 should be kept at a specified place. The master agreement provided that before the lessee would use, store or install any goods other than mobile goods in any premises not owned by the lessee the lessee would notify the owner of its intention to procure from the landowner, landlord, tenant or occupier of the said premises. The master agreement further provided that upon termination of the leasing agreement, the lessee would pay the owner all rental due or in arrears at the date of such termination together with interest at the default rate of interest specified in the leasing agreement, the portion of the primary rent which had not fallen due at the date of such termination; and interest on the amounts due. The second defendant was one of the three guarantors who executed three separate letters of guarantee on 28 November 1984. Under the letter of guarantee the second defendant agreed to pay on demand any sum due and payable by the first defendant to the plaintiff under the leasing agreement. On 28 November 1984 the plaintiff was informed by a registered proprietor of a certain premises that the first defendant had, without the consent, agreement or knowledge of the registered proprietor, installed and affixed the goods in the said premises. The plaintiff alleged that the first defendant had failed to procure from the owner a wavier of any rights of the owner and thereby committed a breach of the master agreement. Both the master agreement and the leasing agreement were terminated on 9 March 1985. The plaintiff claimed that as a result of the breach, they had suffered losses and damages in the sum of RM848,841.11 as at 22 January 1985. A letter of demand was sent to the second defendant by an AR registered letter dated 28 March 1985.

The plaintiff's case was based on the master agreement and the leasing agreement. Clause 8 of the master agreement states:

> (a) The lessee shall (unless otherwise provided in the leasing contract relating thereto) permanently keep or, in the case of mobile goods, garage or keep the goods at the premises specified in the leasing contract relating thereto or at such other premises as may have been previously authorised in writing by the owner. Where no premises are so specified the lessee may garage or keep the goods at its discretion at any premises but the lessee shall if at any time called upon so to do by the owner forthwith inform the owner in writing of the premises

where the goods are garaged or kept and shall thereafter continue to garage or keep those goods at those premises or at such other premises as may have been previously authorised in writing by the owner.

(b) Before the lessee shall use, store or install any goods other than mobile goods in any premises not at the time owned by the lessee, the lessee shall notify the owner of its intention and procure from the landowner, landlord, tenant or occupier of the said premises a waiver in such form as the owner may reasonably require of any rights which such landowner, landlord, tenant or occupier might otherwise be or become entitled to claim in or against the goods or any part thereof, if the same were so used, stored or installed.

The provisions relating to default and termination of the master agreement are found in Clause 11(a) of the said agreement. Clause 11(a), *inter alia*, states:

...Or if the lessee shall fail to perform or observe any of the terms and conditions of any leasing contract or if the lessee shall do or cause to be done or permit or suffer any act or thing whereby the owner's rights in the goods may be prejudiced or put into jeopardy, then and in any such event, the owner may (without prejudice to any other right or remedy of the owner and notwithstanding that some period in respect of which rental has already been paid in advance may not yet have expired) terminate the leasing of all the goods specified in any or all the leasing contracts by resuming possession of the goods without any notice to the lessee or by notice in writing to the lessee and notwithstanding the termination of the leasing the lessee shall be liable for any amounts required of it under Clause 14 hereof in respect of all leasing contracts.

Clause 14 provides for the mode of payment on termination of the master agreement. Clause 14(a)(i) is reproduced below:

(a) Should the leasing of any goods be terminated by the owner or by the lessee as above or otherwise as provided in the leasing contract prior to expiration of the primary period in respect thereof, then (subject to any special conditions contained in the leasing contract relating to such goods):

(i) The lessee shall thereupon pay to the owner:

(a) all rentals due or in arrear at the date of such termination together with interest at the default rate of interest specified in the leasing contract relating thereto from the due date for payment thereof until payment, and

(b) the portion (if any) of the primary rent which has not fallen due at the date of such termination, and

(c) the residual value (if any) specified in respect of the goods in the leasing contract relating thereto, and

(d) such further sum (if any) as may be specified in the leasing contract relating thereto, and

(e) interest on the amounts due under (b), (c) and (d) above at the default rate of interest specified in the leasing contract relating thereto from the date of such termination until payment...

With regard to Clause 8(a) of the master agreement, the premises where the goods were to be kept or located; was specified in Clause 10 of the leasing agreement. Clause 10 states:

Notwithstanding any provision of the master agreement the goods are and shall be located at: No. 38, Bukit Tambun, Province Wellesley.

The goods shall not be taken out of West Malaysia...

In para. 9 of their affidavit affirmed on 7 May 1986, the plaintiff averred that by a letter dated 28 November 1984 sent by a firm of solicitors acting for one Aw Hong Hooi, the registered proprietor of the premises, the plaintiff was informed that the first defendant had without the consent, agreement or knowledge of the registered proprietor, installed and affixed the said goods in the premises. The said letter is reproduced below:

M/s. Bumiputra Lloyds Leasing Berhad,
28th Floor, Menara Tun Razak,
Jalan Raja Laut,
Kuala Lumpur.

Dear Sirs,

We act for Mr. Aw Hong Hooi of No. 17 Green Hall, Penang, the registered owner of all that piece of land known as Holding No. 75 Mukim 14 PW South together with the building erected thereon. The subject property is at Bukit Tambun.

We are instructed to state that Technomewa Sdn. Berhad have without our client's knowledge, consent or agreement repaired and renovated the said building and have installed and affixed equipments and machineries in the said building and we understand that you are the leasing company of the said equipments and machineries.

We have given notice to the company and Mr. Lee Heng Yeow to dismantle and remove the said equipments and machineries and after such dismantle the same to quit and deliver up peaceful vacant possession of the said building.

We are further instructed to serve you notice and to inform you that we will be instituting injection and ejection proceedings against the company and Mr. Lee Heng Yeow.

Yours faithfully,

Sgd/-

In para. 10 of the said affidavit the plaintiff claimed that the first defendant had failed to procure from the registered owner a waiver of any rights of the registered owner and thereby committed a breach of the master agreement. As a result of the breach the plaintiff terminated the leasing agreement and demanded payment in the sum of RM848,841.11 from the first defendant in a letter dated 9 March 1985 addressed to the first defendant. The letter of termination is reproduced below:

Syarikat Teknomewa Sdn. Bhd.
464-0 Hill Railway Road
Ayer Hitam,
Penang.

Dear Sirs,

Termination of Leasing Contract

No. LC/84/23 and claim for damages.

We act for Bumiputra Lloyds Leasing Berhad.

We are instructed by our clients to state that you have breached the terms of the leasing contract by installing and affixing the leased equipments and machineries in the building without the knowledge, consent or agreement of the owner of the said building.

Take notice that as a result of your breach, the leasing Contract No. LC/84/23 made between you and our clients is hereby terminated.

We are instructed by our clients to demand from you the sum of RM848,841.11 as at 22 January 1985 being the sum owing to them pursuant to the said leasing contract, particulars of which are as follows:

Pre-lease charges	-	RM9,824.70
Interest compounded	-	5,801.45
Stamp duty	-	4,133.00
Repossession charges	-	5,062.90
LC charges	-	2,534.62
Storage charges	-	200.00
Interest compounded	-	1,120.44
Commitment	-	820,164.00
Total		RM848,841.11

and interest thereafter 22 January 1985 at a rate of 0.495 cents per thousand.

You are also adviced that you are additionally liable to our clients for the disposal costs of the equipment and all further storage charges, the amount of which shall be notified to you shortly.

In the event you fail to pay the above sum of RM848,841.11 and interest accruing thereon within seven (7) days from the date hereof, legal proceedings will be instituted against you for recovery of the same without further reference, in which case, you will additionally become liable for costs.

Yours faithfully.

In para. 13 of the said affidavit the plaintiff averred that the first defendant had failed to pay the said sum of RM848,841.11 or any part thereof and judgment in default of appearance was entered against the first defendant on 14 June 1985.

As already stated, the second defendant was a guarantor who executed a letter of guarantee on 28 November 1984. The letter of guarantee which was addressed to the plaintiff states, *inter alia*:

In consideration of you at my request leasing goods from time to time to Syarikat Teknomewa Sdn. Bhd., (hereinafter called "the lessee") pursuant to:

(a) Master agreement; and

(b) Leasing contracts made or to be made pursuant thereto...I hereby unconditionally guarantee to and agree with you as follows:

(1) I hereby guarantee the due and proper performance by the lessee of all obligations to be performed by the lessee under the agreements and guarantee that if for any reason whatsoever the lessee shall make any default in paying any sum that may become due or payable to you thereunder will pay the amount thereof to you forthwith upon demand therefore in writing.

Clause 9 of the letter of guarantee further states:

As a separate and independent undertaking I agree that any sums mentioned in Clause 1 hereof which may not be recoverable on the footing of a guarantee whether by reason of any legal limitation inability or incapacity on or of the lessee or any other fact or circumstance and whether known to you or not shall nevertheless be recoverable from me as sole or principal debtor in respect thereof and shall be paid by me on demand.

By an AR registered letter dated 28 March 1985 the plaintiff through their solicitors demanded from the second, third and fourth defendants payment of the said sum.

In his statement of defence, the second defendant denied that he was a director of the first defendant. He said that he only signed a blank document and denied that he had any knowledge of the contents of para. 7 of the statement of claim which stated that by a written guarantee dated 28 November 1984 executed by the second defendant, the second defendant agreed to pay on demand any some due and payable by the first defendant to the plaintiff under the leasing agreement. The second defendant further stated that "at all material times he was not a director of the first defendant and ... accordingly the purported guarantee of the second defendant is null and void and not binding on the second defendant at all." He claimed that there was no consideration for the guarantee. He stated that alternatively the guarantee was entered into by mistake of fact.

The plaintiff, in para. 18 of the affidavit affirmed on 7 May 1986 averred that the second defendant represented to the plaintiff that at all material times he was the director of the first defendant. The plaintiff further averred that the master agreement was signed by the second defendant. The plaintiff exhibited to the affidavit a circular resolution of the first defendant dated 18 May 1984, Form 49 dated 15 June 1985; and a letter from the plaintiff to the first defendant dated 9 May 1984 to show that the second defendant was at the material times the director of the first defendant. In the circular resolution the first defendant agreed to accept the leasing facility granted by the plaintiff also decided that the leasing loan would be guaranteed by all the directors of the first defendant. The circular resolution is reproduced below:

> That the company do hereby accept the leasing facility of sum MYR 600,000 granted by M/s. Bumiputra Lloyds Leasing Berhad which shall be repayable by Forty-Eight (48) monthly installments at primary rent rate of MYR 27.50 per MYR 1,000 of cost per month payable in advance. The condition of the leasing loan shall be strictly conformed to the master agreement and leasing contract laid down by Bumiputra Lloyds Leasing Berhad. That the above leasing loan shall be guaranteed, jointly and severally, by all directors of the company.
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> Sgd/-
>
> Syed Kahiruddin bin Syed Hassan.
>
> Sgd/-
>
> Lee Heng Yeow.
> Ooi Lay Hwa.

It will be noted that the second defendant signed the above circular resolution. Form 49 shows that the second defendant was a director of the plaintiff. He was appointed director with effect from 15 June 1983. The letter dated 9 May 1984 was sent by the plaintiff to the first defendant confirming that the plaintiff was willing to provide the first defendant with a leasing facility subject to the terms and conditions stated in the letter. At the bottom of the said letter was stamped the name of the first defendant. There are two signatures above the word "director" of the first defendant and the first signature is the signature of the second defendant because it is the same signature as that in the circular resolution, in the master agreement where he signed as a director of the first defendant and in his affidavit affirmed on 29 October 1986. In my opinion, the documents before the Court show that he was a director of the first defendant at the material times. For the purpose of the guarantee it was immaterial whether he signed the document as a director or not: he was bound by the terms of the guarantee unless he raised a defence of *non est factum*.

In para. 5 of his statement of defence, the second defendant admitted signing the guarantee although he denied any knowledge of the contents of the said guarantee. In his affidavit affirmed on 29 October 1986 he stated:

> Sometime in late 1984, the 3rd defendant came over one night and asked me to sign some sheets of paper. They were all mostly printed, uncompleted documents and the 3rd defendant said these were formalities that had to be complied with for leasing facilities as there was a 'hitch' in the bank loans.
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> Believing that the said documents were required merely as a formality, I executed them and handed the same to the 3rd defendant. It would now appear that the documents signed by me was the master leasing agreement and the guarantee, the latter being witnessed by the 3rd defendant himself. Also it appears a purported resolution agreeing to the leasing was signed by me. It has now come to my knowledge that the resolution was not signed by the 4th defendant and it was not formalised with the company's secretaries.

From the two paragraphs quoted above, it appears that the second defendant was pleading *non est factum*. In *Avon Finance Co. Ltd. v. Bridge & Anor.* [1985] 2 All ER 281, it was decided by the English Court of Appeal that the doctrine of *non est factum* had limited application and could only be relied on by the defendant if he had exercised reasonable care in the circumstances in connection with the transaction. The Court of Appeal also decided that on the facts of that case it was not possible to find that the defendants had exercised such reasonable care as was appropriate in the circumstances in entering into the transaction; and accordingly the defendants could not rely on the defence of *non est factum*.

The plaintiff, in their supplementary affidavit affirmed on 11 May 1987 contended that the second defendant did not exercise reasonable care when executing the documents. In para. 2 of the same affidavit the plaintiff averred:

> 2. In reference to paras. 11 and 12 of the affidavit of Syed Khairuddin, I say that at the material time the 2nd defendant was a stockbroker and a member of the Kuala Lumpur Stock Exchange. The 2nd defendant ought to have known the nature and content of the said documents and ought to have exercised reasonable care when executing the said documents.

Mr. L.T. Chia, Counsel for the plaintiff cited *The First National City Bank of Chicago v. Tan Lai Wah* [1981] 1 MLJ 100. In that case the respondent had been a landbroker from seventeen to eighteen years. She contended that she did not know that the document which she signed was a guarantee for an unlimited amount otherwise she would never have signed it. Her plea of *non est factum* was accepted by the Singapore High Court and the bank's claim was dismissed. The bank appealed on the ground that the trial Judge erred in fact and in law in finding that the plea of *non est factum* had been successfully established by the respondent. The Singapore Court of Appeal held that the learned Judge was wrong in deciding that the respondent had successfully established the plea of *non est factum*. In its judgment (pp. 102 - 104) the Singapore Court of Appeal stated,

> 1. The plea of *non est factum*
>
> The plea of *non est factum* can only be rarely be established by a person of full capacity and although it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning. The burden of establishing a plea of *non est factum* falls on the party seeking to disown the document and that party must show that in signing the document he acted with reasonable

care. Carelessness (or negligence devoid of any special technical meaning) on the part of the person signing the document would preclude him from later pleading *non est factum* on the principle that no man may take advantage of his own wrong; it is not, however an instance of negligence operating by way of estoppel.

From this evidence it seems clear that the 4th defendant some few days before the signing of the guarantee had agreed to stand guarantor in favour of the bank for an extension of another year of facilities given to the 1st defendants.

It was never in dispute that the document the defendant had singed had factually not been read, explained or translated to her. There is however no evidence that his competent land broker had asked to the 2nd defendant or Lim Sin or for that matter the translate-clerk for such reading, explanation or translation before signing.

It would appear from the judgment of the learned Judge that he had agreed with a submission by Counsel for the 4th defendant that there was only one material fact in dispute and that this revolved around what was said by Lim Sin to the 4th defendant when he telephoned her on the afternoon of 18 April 1974 before he attested her signature to the guarantee. With respect we do not agree with this approach. The *non est factum* issue, in our view, did not resolve so much around the credibility or otherwise of Lim Sin. The 4th defendant's solicitors as around the question whether the 4th defendant knew the nature and content of the document she was signing, that is to say, whether she knew that she was signing an unlimited guarantee in favour of the plaintiffs to secure overdraft facilities being extended by the plaintiffs to the 1st defendant for a further one year.

A reading of the first letter, paying special attention to its subject heading makes it, in our view, patently clear that the 4th defendant certainly knew on or about 22 April 1974, if not before, that the had signed an unlimited guarantee, on 18 April 1974, that is to say 4 days earlier, in favour of the first defendants and not as she says, a document guaranteeing to her a 50% interest in No. 10. The second and third letters clearly indicate that certainly on or about 8 August 1974, if not before - that is to say about 8 August 1974. On the basis of her evidence it is difficult to understand why she should have signed a document guaranteeing her a 50% interest in No. 10, in such circumstances one would have thought that it should have been the 2nd defendant, and not she, who should have been the signatory. Again, it is difficult to understand why this document of proof of her 50% interest in No. 10, having been signed, should have been allowed to be taken away by the 2nd defendant and handed over to the plaintiffs and not kept by her as such proof. It is even more difficult to understand why after sighting the first letter she did nothing about the 2nd defendant having tricked her into signing an unlimited guarantee in favour of the plaintiffs. We are satisfied that, if the attention for the learned trail Judge had been specifically directed to these three documents, he would not have held as he did, that, in his judgment, the 4th defendant had successfully established the plea of *non est factum*.

It is also our view that having regard to her long experience as a land broker and other spheres of business as previously set out - factors which the learned trial Judge appeared to have not considered - her mere assertion that she thought the document she signed was one guaranteeing her a half share in No. 10 was unbelievable.

In the present case the second defendant was not an illiterate person. On the other had he was a director of the first defendant. He was also a stock broker and a member of the Kuala Lumpur Stock Exchange. He should have known the nature and content of the documents he signed. But he failed to exercise reasonable care when he executed the said documents. Taking into consideration all the circumstances in the present case, I find that the second defendant was not entitled to rely on the defence of *non est factum*.

The second defendant's next defence was that the "plaintiffs and the third defendant made the representation fraudulently knowing that they were false..." No particulars of fraud were given in the defence. In support of his allegation of fraudulent misrepresentation he averred in his affidavit affirmed on 28 October 1986 as follows:

> I crave leave to refer to para. 8 of my defence. The 2nd defendant fraudulently misrepresented to me that as a director I had to sign the documents. The fact was, I was not a director and as such I am advised and verily believe that the consideration for the execution of the guarantee has failed, as the plaintiffs had specifically required guarantees from only the directors of the 1st defendant.
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> I had all along been promised shares in the 1st defendant by the 3rd defendant and also a directorship. Contrary to the promises, no shares were allotted to me and neither was I formally appointed a director. The 3rd defendant insisted me into signing the documents as a director when I had formally not been appointed and registered as a director with the Registrar of Companies.

The basis of the second defendant's allegation of fraudulent misrepresentation was that he claimed that he was not a director. As I have already found that he was at the material times a director of the first defendant his allegation of fraudulent misrepresentation had no foundation whatsoever. In any event the allegation of fraudulent misrepresentation was a mere assertion on the affidavit. Such assertion which was to be the basis of his defence did not itself provide leave to defend. See *Banque De Paris Et Des Pays-Bas v. Costa De Naray* [1984] 1 Lloyd's Rep 21.

I find that the defence is a sham defence and for the reasons already stated I allowed the appeal with costs.

Also found at [1990] 2 CLJ 23